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IN THE

Supreme Court of the United States

70-261

No. ~~1805,~~ October Term, 1970

JOSEPH P. SCOTT,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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Statement

The State submits this brief in opposition to petitioner's application for a writ of certiorari to review the decision of the Court of Appeals of the State of New York affirming the dismissal of his claim against the State of New York for false imprisonment.

The New York State Court of Claims dismissed petitioner's claim for false imprisonment on June 22, 1967. No opinion was rendered on this dismissal. An appeal was taken to the Appellate Division of the New York State Supreme Court, Third Judicial Department, which Court affirmed the judgment of the Court of Claims by order dated July 8, 1970. The opinion of the Appellate Division is reported at 34 N. Y. A D 2d 1041. A further appeal was taken by petitioner to the New York Court of Appeals, which Court affirmed the order of the Appellate Division. The Court of Appeals order in this matter was dated April 21, 1971. The Court of Appeals wrote no opinion.

Questions Involved

1. Is the issue of whether a judicial decision affecting the validity of a state retaining an insane prisoner after the termination of his sentence in a state hospital for mentally ill prisoners to be given retrospective application as to a claim for money damages, a constitutional question?

2. In a case in which petitioner was duly committed and held in a state hospital for mentally ill prisoners after termination of his sentence pursuant to New York State Correction Law § 408 *et seq.*, which sections had not been declared unconstitutional either directly or by inference prior to *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), should the State be held liable in money damages for wrongful detention of petitioner by giving *Baxstrom* retrospective application?

Facts

Petitioner brought a claim against the State for damages for alleged wrongful detention in Matteawan State Hospital. Matteawan State Hospital is a hospital under the jurisdiction of the New York State Department of Correction (now the Deparment of Correctional Services). He had been originally sentenced on February 2, 1947 to a 3-year term for malicious injury arising out of the willful setting of a fire to a dwelling house. His term expired on February 2, 1950. On June 23, 1949, prior to the expiration of his term, petitioner was transferred from the New York State Vocational Institution to Matteawan State Hospital. The transfer was made under order of Judge PAUL FROMER, Greene County Judge, which order was on notice to petitioner and made after a psychiatric examination showed that he was mentally ill. New York Correction Law § 409, which was in effect in 1950, provided that:

> "Whenever any prisoner in the Matteawan state hospital shall continue to be insane at the expiration of the term for which he was sentenced, he may be retained therein until he has recovered or is otherwise legally discharged. The superintendent of such hospital may discharge and deliver any patient whose sentence has expired, and who is still insane, but who, in the opinion of the superintendent is reasonably safe to be at large, to his relatives or friends who are able and willing to comfortably maintain him, without further public charge; and such patient may, in the discretion of the superintendent, be provided with the whole or a portion of such allowances as are hereinafter granted to recovered prisoners. * * *"

At the time that petitioner's sentence was completed, he was found to be insane and the superintendent of the institution ordered him retained in that institution. *Baxstrom* was decided by this Court on February 23, 1966. Petitioner was transferred from Matteawan to Manhattan State Hospital, a civil hospital, on March 25, 1966. On July 29, 1966, Section 409 was repealed. No claim is made for the period of petitioner's confinement after his transfer to Manhattan State Hospital.

There was only one decision in the New York State Courts prior to *Baxstrom* which considered Section 409 of the Correction Law. It was *Negro* v. *Dickens*, 22 N. Y. A D 2d 406 (1st Dept., 1965). The petitioner in *Negro* was committed to Matteawan State Hospital after having been charged with and having pleaded not guilty to the crimes of robbery, larceny and assault, but not been tried, and sought release after 21 years in Matteawan. The Appellate Division in that case stated that an accused who is presumed to be innocent until convicted is entitled to at least the same protection as a prisoner is given under Correction Law § 409, saying (p. 414):

> "Continuing the indictment in the case at bar presents this statutory incongruity: namely, that whatever benefit section 409 of the Correction Law bestows on a Matteawan inmate is available to one who has been previously found guilty of crime and whose sentence has expired, but is denied to petitioner, who still possesses the presumption of innocence and whose sentence will never begin. Since the provisions of section 409 seem consistent with continued detention of petitioner in Matteawan as a 'medically advisable procedure', we should think that the District Attorney may properly inquire, and indeed should, why petitioner's circumstances are such that the restraints of section 409 are thought ineffective."

Thus, *Negro,* at least inferentially, held Section 409 to be constitutional.

The cause of action in the instant case then is for damages because the State followed Section 409 of the Correction Law at a time before there was any Court decision holding this statute to be unconstitutional.

Decisions Below

The only written decision in the New York State courts was that of the Appellate Division which affirmed the order dismissing petitioner's claim. In that decision the Court said:

> "The appellant seeks damages for his detention at Matteawan State Hospital after termination of his sentence of imprisonment in 1950 until his transfer to a civilian State hospital in 1966. The record establishes that the procedures for commitment to Matteawan and retention therein as provided in section 408 *et seq.* as in effect during the period of time in question were followed by the County Judge of Greene County and apparently by the officials at Matteawan. The claimant made no allegation that he was at any time sane or that he is at present sane, but instead alleged that the confinement at Matteawan pursuant to the Correc-

tion Law in 1950 was false imprisonment as the provisions of section 408 *et seq.* and particularly section 409 were unconstitutional. The State concedes that the provisions for retention at Matteawan upon the termination of the claimant's sentence pursuant to section 409 of the Correction Law were unconstitutional. The claimant limits his claim for damages to the unavailability of privileges at Matteawan which he would have had at a civilian institution. (*Cf. Matter of Negro* v. *Dickens,* 22 A D 2d 406, 408.) The claim in this case is essentially the same as that considered in *Dennison* v. *State of New York* (28 A D 2d 608, 609, affd. 23 N Y 2d 996, mot. to amend remittitur gtd. 25 N Y 2d 904, cert. den. 397 U. S. 923, 90 S. Ct. 922, 25 L. Ed. 2d 103 (February 24, 1970)."

ARGUMENT

As it was in *Dennison*, certiorari should be denied here because in both cases no substantial constitutional question is involved, the sole question being the retrospective application of *Baxstrom* in a claim for damages, and this was a matter of judicial policy to be decided by the highest State Court hearing the case.

The Appellate Division of the New York State Supreme Court in its decision in this matter correctly stated (34 N Y A D 2d 1041 [3rd Dept., 1970]):

> "The claim in this case is essentially the same as that considered in *Dennison* v. *State of New York* (28 A D 2d 608, 609, affd. 23 N Y 2d 996, mot. to amend remittitur gtd. 25 N Y 2d 904, cert. den. 397 U. S. 923, 90 S. Ct. 922, 25 L. Ed. 2d 103 (February 24, 1970)."

In *Dennison*, the New York State Court of Appeals stated that it considered among other questions, the question of whether *Baxstrom* should be given retrospective application in civil damage claims. The New York Court of Appeals on the motion to reargue or amend the remittitur in *Dennison* said:

> "Clamiant argued that his commitment in 1936 and his retention pursuant to the then existing Section 384 of the Correction Law constituted a violation of his rights under the equal protection clause (see *Baxstrom* v. *Herold* [383 U. S. 107]), entitling him to damages for his retention in a criminal, rather than a civil hospital for the insane. The Court of Appeals considered this contention and held that claimant had no right to damages based on a retrospective application of *Baxstrom* v. *Herold* (*supra*). Other constitutional issues based on violation of due process raised by claimant were not determinative because the Court concluded that he sustained no actionable damages."

In dismissing *Dennison's* application for certiorari, this Court rejected the contention that the retrospective application of *Baxstrom* in a claim for damages is a substantial constitutional question.

Retrospective application of a judicial decision has long been held to be one for the Courts to decide as a matter of judicial policy.* Constitutional rights are not involved in determining retrospective or prospective application of a judicial decision. This Court in *Johnson* v. *New Jersey*, 384 U. S. 719 (1966) stated (p. 733):

> "At the same time, we do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. Our introductory discussion in *Linkletter*, and the cases cited therein, have made it clear that *there are no jurisprudential or constitutional obstacles to the rule we are adopting here.*

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* In *Lyon* v. *Richmond*, 2 J. Ch. 51 (1817), Chancellor Kent wrote 150 years ago (p. 60):

> "And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years, before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found."

> See 381 U. S., at 622-629. *In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner.*" (Emphasis supplied.)

This question was again considered by this Court in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), this time with respect to whether *Mapp* v. *Ohio*, 367 U. S. 643 (1961) should be given retrospective application, and again retrospective application was denied. In *Linkletter*, this Court said (p. 637):

> "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." (Emphasis supplied.)

See also *People* v. *McQueen*, 18 N Y 2d 337 (1966).

In *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932), this Court said (364):

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> "We think the federal constitution has no voice upon the subject. *A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.* It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." (Emphasis supplied.)

Just as the "ruptured privacy of the victims' homes" could not be restored, as noted in *Linkletter*, so too the

years that Scott spent in a State criminal institution cannot be changed. If Scott were at the present time being retained in a State criminal institution, there would be just reason for applying *Baxstrom* retrospectively to 1965 when it was decided, and releasing Scott from the institution. This is not the case here. We have a question of damages only. The State has corrected any *Baxstrom* situations which existed at the time the decision was handed down by transferring all persons held in a criminal institution after the expiration of their sentences. This, under *Baxstrom*, it was obliged to do, and this should be the limit of retrospectiveness given to the *Baxstrom* rule.

In *Johnson* and in *Linkletter*, questions of a person's liberty were being considered. In those cases this Court, despite this did not give retrospective application to the doctrine involved. There would have been more reason to give retrospective application to a rule in a criminal case when a person's liberty is being affected than in a civil case when it is a question of money only.

In claims for damages *Baxstrom* should only be given prospective application. The question of liability of a State in tort is not a constitutional question. At common law the State could not be sued for wrongs it committed. It is only because states have consented, by enactment of statutes, to be sued for their torts that they now may be sued, and suit against the State is limited to the extent of consent.

See *Parden, et al.* v. *Terminal Railway of the Alabama State Docks Department, et al.*, 377 U. S. 184 (1964), where this Court said (p. 186):

> "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, *this Court has recognized that an unconsenting*

> *State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. Hans* v. *Louisiana,* 134 U. S. 1; *Duhne* v. *New Jersey,* 251 U. S. 311; *Great Northern Life Ins. Co.* v. *Read,* 322 U. S. 47, 51; *Fitts* v. *McGhee,* 172 U. S. 516, 524. See also *Monaco* v. *Mississippi,* 292 U. S. 313." (Emphasis supplied.)

There is, therefore, no constitutional bar to the State Court's denial of damages by refusing to give retrospective application of *Baxstrom* in the instant case. It is a question of judicial policy which had to be decided here by the New York State Court of Appeals.

As was stated by the New York State Court of Appeals in *People* v. *Howard,* 12 N Y 2d 65 (1962) (p. 66):

> "As an abstract matter, there are few who would dispute the proposition that it is highly desirable that the law provide corrective process at any time for any substantial defect. *There is, on the other hand, an unmistakable social value in putting an end to litigation at some point and there is, as well, an unmistakable social burden in affording corrective process for any defect.*" (Emphasis supplied.)

It would be inequitable to hold the State liable in damages for not applying the *Baxstrom* doctrine in 1950 at a time 14 years before it was conceived. There was in 1950 no case holding that § 409 of the New York State Correction Law, the law under which petitioner was being held, was unconstitutional. It would be wrong to hold the State of New York liable in damages for not anticipating an adverse holding which came 14 years later. Law is not static and is continually changing. In recent years the pace of change in criminal matters has been even greater than in former times. We do not quarrel with the concept of a changing law. We merely urge that the State should not be charged with liability for its past actions based on a

new judicial decision establishing standards not even dreamed of at the time the action occurred. It is necessary for states and persons to be protected from the effects of *ex post facto* judicial holdings just as much as it is to protect them from *ex post facto* legislation.

CONCLUSION

It follows, therefore, that certiorari should be denied in the instant case.

Dated: June 23, 1971

Respectfully submitted,

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